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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 572

MINNIE KRANTMAN,

Petitioner,

vs.

LIBERTY LOAN CORPORATION, a Delaware Corporation, I. H. LEVY, D. J. HARRIS, DAVID B. LICHTENSTEIN, LYLE S. WOODCOCK and DAVID S. NERAD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Minnie Krantman, the plaintiff in the trial court, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in Case No. 11903 affirming the judgment of the trial court dismissing the plaintiff's case for want of equity at the close of plaintiff's case.

OPINION BELOW.

The opinion of the trial Judge, the Honorable J. Sam Perry, Judge of the United States District Court for the Northern Division of Illinois, Eastern District, is reported in 152 F. Supp. 705 under the name *Minnie Krantman* v. *Liberty Loan Corporation, et al.* The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 246 F. 2d 581 under the name *Minnie Krantman* v. *Liberty Loan Corporation, et al.* The opinion of the Court of Appeals appears in the Appendix to this Petition, page 1a. The opinion of the trial court appears on pages 37 to 59 in Appendix to Appellant's Brief certified as part of the record.

JURISDICTION.

The date of the judgment of the United States Court of Appeals for the Seventh Circuit sought to be reviewed is July 29, 1957. The time of the entry of said judgment was July 29, 1957.

No order respecting a rehearing was entered.

The statutory provision believed to confer on the Supreme Court jurisdiction to review the judgment in question by writ of certiorari is Title 28, U. S. C. Section 1254 (1) (62 Stat. 928).

QUESTIONS PRESENTED FOR REVIEW.

1. Did the Court of Appeals correctly interpret Rule 52 (a) Federal Rules of Civil Procedure, 28 U. S. C. as requiring an affirmance of the judgment when at no time was there any conflict as to any evidentiary fact, the only dispute being whether in law the actions of the individual defendants constitute a breach of their fiduciary duties, a gift of corporate assets to themselves, and a fraud upon the Liberty Loan Corporation and its Class A stockholders?

2. Did the Court of Appeals correctly apply Delaware law in ignoring Article IX Section 3 of the Constitution of the State of Delaware, Section 122 (9) of the Delaware Corporation Law (Volume 4, Delaware Code Annotated, Title 8, Section 122 (9)) and the Delaware case law in affirming Judge Perry's decision that no gift of corporate assets or fraud occurred when the newly elected Board of Directors of Liberty Loan Corporation under the presidency of defendant, David B. Lichtenstein, on July 20, 1954, voted to issue 68,000 shares of Class A stock under the Employees' Stock Purchase Plan to defendant Lichtenstein and his family at a price of $17.00 per share when the market price of the Class A shares was 21-1/8?

3. Did the Court of Appeals correctly apply Delaware law in ignoring Article IX, Section 3 of the Constitution of the State of Delaware, Section 122(a) of the Delaware Corporation Law, and the decided cases of Delaware and other jurisdictions in affirming Judge Perry's decision that no fraud or gift of corporate assets occurred when 7500 Class B shares of Liberty Loan Corporation (7241 of which were owned by Lichtenstein's group) having a book value of $125,353 and annual dividend rights to 1 6% of the dividends were re-classified into 100,000 common shares having a book value of $1,388,049 and annual dividend rights (after $.90 per share once was earned) of 17.3% of the dividends, and the Class A shares correspondingly suffered a decrease in book value from $7,421,158 to $6,163,174 and a decrease in dividend rights from 97.2% to 77.7% of the dividends of Liberty Loan Corporation?

4. Did the Court of Appeals correctly refrain from considering the law relating to the fiduciary obligations of defendant Lichtenstein in (1) the purchase by Lichtenstein and his family of 68,000 Class A shares of Liberty

Loan Corporation at a price of $280,500 below the market for Class A shares, and (2) in the participation by Lichtenstein in the reclassification of 7500 Class B shares of Liberty Loan Corporation with an equity of $125,353 to 100,000 common shares with an equity of $1,388,049.00?

5. Did the Court of Appeals correctly refrain from considering the law relating to the fiduciary obligations of defendant, I. H. Levy, Chairman of the Board of Directors of Liberty Loan Corporation, as to the transaction in which Levy and his relatives received $1,700,000.00 for the sale of 7241 controlling Class B shares of Liberty Loan Corporation, which had a book value of $121,024 and annual dividends of $10,861.50?

6. Did the Court of Appeals correctly refrain from considering whether the vote of shareholders of the Liberty Loan Corporation constituted a ratification of the Employees' Stock Purchase Plan and the reclassification of Class B shares as part of a merger when $48,463.65 of the corporation's money was paid to 72 securities dealers for the solicitation of favorable Class A votes?

7. Did the decision of the Court of Appeals by its complete neglect of the legal issues of the case so depart from the abiding principles of judicial procedure and so constitute a gross miscarriage of justice as to call for the exercise by the Supreme Court of its power of supervision?

STATUTES INVOLVED.

The Statutes, Constitutional Provisions and Rule involved are as follows:

1) Delaware State Constitution, Article IX, Section 3: "No corporation shall issue stock, except for money paid, labor done or personal property, or real estate or leases thereof actually acquired by such corporation."

(Vol. 1, *Delaware Code Annotated,* page 321)

2) Vol. 4, *Delaware Code Annotated,* Title 8, Section 122 (9); Section 122 (9) Delaware Corporation Law:

"Section 122. *Specific Powers.*

Every corporation created under the provisions of this Chapter shall have power to * * * (9) Make donations for the public welfare or for charitable, scientific or educational purposes; * * *"

3) Vol. 4, *Delaware Code Annotated,* Title 8, Section 152; Section 152 Delaware Corporation Law:

§ 152. Issuance of stock; lawful consideration

Subscriptions to, or the purchase price of, the capital stock of any corporation organized under this Code or any other law of this State may be paid for, wholly or partly, by cash, by labor done, by personal property, or by real property or leases thereof; and the stock so issued shall be declared and taken to be full paid stock and not liable to any further call, nor shall the holder thereof be liable for any further payments under the provisions of this chapter. In the absence of actual fraud in the transaction, the judgment of the directors, as to the value of such labor, property, real estate or leases thereof, shall be conclusive.

4) Vol. 4, *Delaware Code Annotated,* Title 8, Section 262; Section 262 Delaware Corporation Law. This lengthy section appears in the Appendix to this Petition.

5) Rule 52, Rules of Civil Procedure for the United States District Court.

Rule 52. *Findings of the Court.*

(a) Effect. * * *

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *

STATEMENT OF THE CASE.

This is a stockholder's derivative suit brought by Minnie Krantman, who purchased 25 Class A shares of Liberty September 16, 1954 (Finding 2, Apx. 41).*

Prior to the stockholders' meeting of November 3, 1954, 7500 Class B common shares without par value and 537,617 $5.00 par value Class A shares of Liberty were outstanding (Finding 3, Apx. 42). 93,600 of the Class A shares were partially paid shares issued under the Employees' Stock Purchase Plan (Findings 23 and 24, Apx. 49, 50). 444,017 Class A shares were fully paid and were held by about 4000 widely scattered investors (Finding 3, Apx. 42).

The Class B shares had dividend rights identical with those of the Class A shares, share for share. The Class B stock had rights on liquidation identical with those of the Class A shares, share for share (Finding 4, Apx. 42). The 7500 Class B shares had the right to elect a minimum majority of the directors of Liberty. The Class A stock had the right to elect the maximum minority of the Directors (Finding 5, Apx. 43).

Originally the 7500 Class B shares were issued to Central States Finance Company, a corporation, in which defendant, I. H. Levy, and his family held controlling stock (Finding 6, Apx. 43). Liberty received $10.00 a share or a total of $75,000 upon the issuance of the 7500 Class B shares. (Apx. 13) Upon the liquidation of Central States in 1939 or 1940, the Class B shares were distributed to its stockholders, and since that time until July 19, 1954, I. H. Levy and his wife held more than ½ of the Class B stock and through such ownership controlled Liberty (Finding 6, Apx. 43).

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* References are to Appendix to Appellant's Brief in the Court of Appeals unless otherwise indicated.

On several occasions prior to July, 1954, I. H. Levy had negotiations with and offers from other finance companies in amounts varying between $1,500,000.00 and $1,800,000.00 for the purchase of 7241 Class B shares held by Levy and his relatives (Finding 7, Apx. 43-44). None of these negotiations matured into a sale (Apx. 9). The only evidence in the record of a sale of Class B stock prior to July 19, 1954 was a purchase by I. H. Levy of 43 shares of Class B stock in March or April of 1954 at $20 to $21 per share (Apx. 9).

Following meetings between Lichtenstein and Levy on May 26 and May 27 (Finding 11, Apx. 45), a group of investors from Missouri through Lichtenstein negotiated a purchase of the 7241 Class B shares held by the Levy family for a price of $1,700,000.00 (Finding 12, Apx. 45).

This group of investors incorporated Key Finance Company, a Missouri corporation, July 2, 1954 (Finding 13, Apx. 46). 47% of the stock of Key Finance Company was owned originally and at the time of the trial by Lichtenstein's wife and two sons (Finding 13, Apx. 46). Lichtenstein's brother owned an additional 12% (499/3665ths) of Key Finance Company (Apx. 21, 26). 9.7% of the stock of Key was owned by William A. Gerard, 9.7% by defendant, Lyle S. Woodcock, and 5.5% by Anthony A. Buford. The last three named persons became directors of Liberty on July 20, 1954 (Finding 13, Apx. 46).

On July 8, 1954, options to purchase 7241 Class B shares were granted to Key Finance Company by I. H. Levy and his wife, Louis Strilky (Levy's brother-in-law), Harriet Levy, (his daughter), and H. H Levy (his brother) and members of H. H.'s family, for $1,700,000. On July 19, 1954, Key exercised the options and became the owner of the 7241 Class B shares, without any commitment that the Class B shares would be reclassified (Finding 14, Apx. 46).

On July 20, 1954, a special meeting of the Board of Directors of Liberty, four members of the seven-man board resigned and William A. Gerard, Anthony A. Buford, David B. Lichtenstein and Lyle S. Woodcock were elected to fill the vacancies (Finding 15, Apx. 47).

At the same meeting both Gerard and Woodcock were elected as Vice Presidents and Lichtenstein was elected President of Liberty. Also, the office of Chairman of the Board was created, and I. H. Levy was elected Chairman. His compensation was fixed at an annual rate of $40,000. At the same meting his resignation as President was accepted and his salary for that office, which had been $65,300 for 1953, terminated. (Finding 16, Apx. 47)

The Employees' Stock Purchase Plan.

At the same meeting of July 20, 1954, the Employees' Stock Purchase Plan was adopted unanimously by the directors. It provided for the issuance of up to 115,000 shares of Class A common stock, under an installment payment program providing for payments over a period of not exceeding five years, to key officers and employees of Liberty. (Finding 17, Apx. 47)

The shares issued under the Plan carried the right to vote the same as fully paid shares. They were to receive dividends declared in proportion to the amount paid in on the shares. Rights of such shares upon liquidation were similarly restricted in proportion to the amount paid in on the shares. The Plan provided for payments as follows: $1.00 for each share purchased payable at the date of purchase; $1.00 for each share purchased due one year after purchase; $1.50 for each share purchased due two years after purchase; a like amount due three years after purchase; $2 for each share purchased due four years after purchase; and a final installment of the

balance five years after date of purchase. (Finding 18, Apx. 48)

The Plan provided that no shares could be transferred except by operation of law until after the lapse of the period of thirty days after the time the shares purchased had become fully paid and nonassessable shares. The first payment made by any purchaser was to be applied ratably toward the purchase price of all of the shares purchased; subsequent payments were to be applied towards the full payment of the purchase price of as many of the shares as possible. (Finding 19, Apx. 48)

The Plan provided that it should be submitted to the stockholders and should be rescinded unless approved by a majority of each class of the then outstanding stock. (Finding 21, Apx. 49).

Initially, the Board of Directors authorized the issuance of 93,600 shares of Class A common stock under the Employees' Stock Purchase Plan, which shares were issued on July 20, 1954 to officers and certain employees, some of whom were proposed by I. H. Levy and the remainder by Lichtenstein. Of these shares Lichtenstein and members of his family or trusts of which they were beneficiaries purchased 68,000 shares. Woodcock purchased 9500 shares, and Gerard purchased 9500 shares. This information was set forth in the proxy statement of September 21, 1954 to the stockholders (Finding 223, Apx. 49-50).

On July 20, 1954, the date of the issuance of the shares to Lichtenstein under the Employees' Stock Purchase Plain at a price of $17.00 per share, the bid price of the Class A common stock of Liberty was 20-½, the ask price 21-¾. (Finding 24, Apx. 50). Thus, Lichtenstein and his family purchased 68,000 Class A shares under the Em-

ployees' Stock Purchase Plan at a price $280,500 below the market for a comparable number of Class A shares on terms of $1.00 per share down, the balance payable, without interest, over a five-year period.

No consideration in the form of an employment contract (Apx. 11) or a non-compete agreement (Apx. 25) passed between Liberty and Lichtenstein for the difference of $4.12½ per share between the purchase price under the plan and the market price of the Class A stock.

By the time of trial several participants in the Employees' Stock Purchase Plan had left Liberty (Apx. 11).

The reclassification of Class B shares.

At the July 20, 1954 meeting, a possible merger of Metropolitan Loan & Investment Company and Metro Finance Co. with Liberty was discussed. The first discussions that Lichtenstein had had with any representative of either Metropolitan or Metro concerning a possible merger with Liberty occurred on July 11, 1954. On September 1, 1954 the directors of Liberty approved a Plan and Agreement of Merger and authorized its submission to a vote of the stockholders. (Finding 26, Apx. 51)

This Merger provided, among other things, for a reclassification of the 7,500 shares of Class B Common stock of Liberty into 100,000 shares of common stock of the surviving corporation, being on an exchange ratio of 13-⅓ shares of new common for each share of Class B, and the exchange of Class A common stock of Liberty for new common on a share for share basis, thereby leaving the surviving corporation with only one class of stock, each share having full voting power on all matters. (Finding 28, Apx. 51)

The 100,000 shares of common stock of the surviving corporation exchanged for the Class B common stock of Liberty were restricted as to dividends, receiving only 7½% of the dividends declared on other shares of common, until the net income of Liberty was $.90 per share in one six-month period. (Finding 32, Apx. 53)

This condition had occurred by the time of the trial (Apx. 13, 30) so that the dividend restriction has been removed permanently and the 100,000 shares issued for the 7500 Class B shares have equal dividend rights with the other common shares of Liberty.

Prior to the reclassification, the book value of both the Class A and Class B common stock was $16.71 per share. The total equity of the 444,017 fully paid Class A shares was $7,421,158. The total equity of the 7500 Class B shares was $125,353.

As of December 31, 1954, following the reclassification of shares, the book value per share of the 444,017 common shares of Liberty was $13.88 per share, a shrinkage of $2.83 per share or total shrinkage of $1,257,984 in equity for all 444,017 Class A shares. The 100,000 common shares exchanged for the 7500 Class B shares had a total equity of $1,388,049, a total increase of $1,262,696, an increase of $168.36 per former Class B share.

After reclassification and the $.90 per share earning condition had occurred, the 100,000 common shares exchanged for the 7500 Class B shares were entitled to 17.3% of the dividends in Liberty, an increase from $11,250 to $150,000 per year based on the annual $1.50 per share dividend. On the other hand, the former Class A shareholders were entitled to only 77.7% of the dividends. (Plaintiff's Exhibit 23 is the basis for the statements in the preceding three paragraphs. That Exhibit is printed as part of the Appendix to this Petition.)

Stockholders' meeting of November 3, 1954.

A fully proxy statement was sent to all stockholders September 21, 1954 with the formal notice of a meeting to be held November 3, 1954 (Finding 34, Apx. 54).

A group of securities dealers was formed by Riter & Co., Edward D. Jones & Co., and Fairman Harris and Company, Inc., for the purpose of soliciting from the stockholders of the corporation proxies in favor of the merger. $.15 per share was payable to dealers for obtaining favorable proxies (Finding 37, Apx. 55). The favorable vote of 173,091 shares of Class A stock on merger and Employees' Stock Purchase Plan was procured by the solicitation of 72 securities dealers for which they were paid $48,463.65 The amount paid to securities dealers includes a fee of $22,50[illegible] paid to the three principal dealers (Apx. 23, Plaintiff's Exhibit 29, Appendix to this Petition).

On November 3, 1954, the stockholders of Liberty voted in favor of both the Employees' Stock Purchase Plan and the Merger. 382,740 shares of Class A common stock present in person or by proxy, being 86.2% of the Class A common stock (excluding stock sold pursuant to the Employees' Stock Purchase Plan which did not vote on the proposition) and 98.8% of the Class B common stock voted to approve the Employees' Stock Purchase Plan. 3.5% of the Class A common stock and none of the Class B common stock was voted against the approval and authorization of said Plan. 486,938 shares of Class A common stock, including 93,000 shares sold pursuant to the Employees' Stock Purchase Plan, and 7,409 shares of the Class B common stock, being 90.7% of all the shares entitled to vote, voted in favor of the Merger (which included the reclassification of the Class B stock into 100,000

shares of the new common stock). Less than 1% of all the shares entitled to vote were voted against the Merger. (Finding 35, Apx. 54).

BASIS OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.

Minnie Krantman, the plaintiff below, is a resident and citizen of the State of Iowa. Defendant, Liberty Loan Corporation, is a Delaware corporation and a citizen of that State. Defendants, I. H. Levy (Chairman of the Board of Liberty), D. J. Harris (Director of Liberty) and David S. Nerad (Secretary of Liberty) are residents and citizens of the State of Illinois. Defendants, David B. Lichtenstein (President of Liberty) and Lyle S. Woodcock (a Director of Liberty) are residents and citizens of the State of Missouri. The amount of the controversy for which the plaintiff sues derivatively in the right of and for the benefit of Liberty Loan Corporation, and the aggregate amount in controversy for which the plaintiff sues as representative of all former Class A common stockholders of Liberty, each exceeds, exclusive of interest and cost, the sum of $3,000.00 (Finding 1, Apx. 41).

Jurisdiction in the United States District Court for the Northern District of Illinois, Eastern Division, is based on Title 28, U. S. C. Section 1332 (a) (1).

ARGUMENT.

It is respectfully submitted that the Court of Appeals for the Seventh Circuit in affirming the trial court's decision decided an important state question in a way in conflict with the applicable Delaware law, both in connection with the Employees' Stock Purchase Plan and in connection with the reclassification of the Class B shares of Liberty.

The trial court's second conclusion of law is as follows:

> "2. Since Liberty Loan Corporation is a Delaware corporation, the issues presented in this action are governed by the law of the State of Delaware."

The trial court then proceeded to ignore the clear and apposite authorities from the State of Delaware on the issues raised. The Court of Appeals similarly neglected to consider in its opinion a single authority on the substantive law of the case either from Delaware or from any other jurisdiction.

The Delaware law on the issuance of stock in circumstances comparable to the Employees' Stock Purchase Plan is that stock issued without adequate consideration is a gift of corporate assets, a fraud upon the corporation and remediable in a stockholders' derivative suit.

The authoritative Delaware case, decided by the Supreme Court of Delaware in 1952 is *Kerbs* v. *California Eastern Airways, Inc.*, 90 A. 2d 652, reargument denied 91 A. 2d 62. Defendant, an operator of aircraft, went through bankruptcy and was reorganized. At a meeting of the Board in October, 1950, a stock option plan and profit-sharing plan was adopted, and a special meeting of the

stockholders called for the purpose of submitting the stock option plan for ratification. A majority of the stock of the defendant corporation was voted in favor of the stock option plan.

The Court said at pages 656-657:

> "The validity of a stock option plan under which selected personnel of a corporation may acquire a stock interest in the corporation depends directly upon the existence of consideration to the corporation and the inclusion in the plan of conditions, or the existence of circumstances which may be expected to insure that the contemplated consideration will in fact pass to the corporation. *Rosenthal* v. *Burry Biscuit Corp.*, 30 Del. Ch. 299, 60 A. 2d 106, *Sandler* v. *Schenley Industries, Inc.*, Del. Ch., 79 A. 2d 606.
>
> * * *
>
> "We think that the stock option plan, as adopted by the directors and as ratified by the majority of the stock, is deficient because it is not reasonably calculated to insure that the defendant will receive the contemplated benefits."

The Delaware Supreme Court held the option plan voidable in a derivative suit by a minority stockholder.

In *Frankel* v. *Donovan* (Del. Chan. Feb. 10, 1956) 120 A. 2d 311 the plaintiff sued to enjoin the granting of options by the corporate defendant to fifty of its executive employees, contending that such options were gifts by the corporation to its officers and employees. The options were approved by the vote of a majority of the stockholders. The court said at page 314:

> "If the options were a gift of corporate assets, the option plans must give way to stockholder attack."

The court specifically found that there was no legal consideration for the granting of the options and that such

grant constituted a gift of corporate assets and was properly subject to attack by the plaintiff.

The court said at page 316:

> "It is not only implicit in amended Section 157 of the Delaware Corporation Law that options must be issued for consideration and in Section 122(9) of the same law that corporate gifts may be made solely for the public welfare or for charitable, scientific or educational purposes, but there is also an accepted corporate rule that majority stockholders have no power to give away corporate property against the protest of the minority, *Rogers* v. *Hill*, 289 U. S. 582, 53 S. Ct. 731, 77 L. Ed. 1385."

The Constitution of the State of Delaware, Article IX, Section 3 provides:

> "Article IX, Section 3. Issuance of Stock. No corporation shall issue stock, except for money paid, labor done or personal property, or real estate or leases thereof actually acquired by such corporation."

Section 122 (9) of the Delaware Corporation Law relied upon in *Frankel* v. *Donovan*, 120 A. 2d 311, provides as follows:

> "Section 122. Specific Powers.
>
> Every corporation created under the provisions of this Chapter shall have power to * * * (9) Make donations for the public welfare or for charitable, scientific or educational purposes; * * *"
>
> (Vol. 4, Delaware Code Annotated, Title 8, Section 122(9).

In *Rosenthal* v. *Burry Biscuit Corp.*, 30 Del. Ch. 299, 60 A. 2d 106, (1948) a stock option plan was invalid because there was no showing that it was granted either to induce the optionee to enter the Company's employ or to remain in it.

Under the Delaware Constitution and under Delaware decided cases, the corporation has no power to give away corporate assets in a stock option and purchase plan. Before the plan will be approved by the courts there must be some contract of employment or other valuable consideration passing to the corporation for the preference in price to the employee or some reasonable guarantee that the corporation will receive the contemplated benefit of the continued services of the employee.

The same basic rules are followed in other jurisdictions. See *Felsenheld* v. *Block Brothers Tobacco Co.*, 119 West Va. Rep. 167 at 178, 192 S.E. 545 at 550; *Holthusen* v. *Edward G. Budd Mfg. Co.*, 52 F. Supp. 125, with which compare *Holthusen* v. *Edward G. Budd Mfg. Co.*, 53 F. Supp. 488.

No consideration has been paid to Liberty for the difference between the Plan price of 17 and the market price of 21-1/8. Neither Lichtenstein nor any other participants in the Plan entered into any employment contract with Liberty (Apx. 11, 20). No non-compete agreement was executed by Lichtenstein (Apx. 20). By the time of the trial several of the participants in the Plan had left Liberty (Apx. 11).

It is respectfully submitted that it is clear under the applicable Delaware law that the participants in the Employees' Stock Purchase Plan, particularly Lichtenstein, the fiduciary President and Director, should be compelled to pay the difference between the market price and the price of shares purchased under the Plan.

While it is true that the law on the reclassification of 7500 Class B shares to 100,000 common shares is not governed by any Delaware case as directly in point as those cited in connection with the Employees' Stock Purchase

Plan, it is respectfully submitted that the basic rule which prohibits the issuance of stock except for a valuable consideration applies with equal force. Article IX, Section 3 of the Delaware Constitution, Section 122 (9) of the Delaware Corporation Law and the Delaware cases cited in connection with the Employees' Stock Purchase Plan are applicable in connection with the reclassification of stock. See also *Rogers* v. *Hill*, 289 U. S. 582, at 591, 77 L. Ed. 1385 at 1391; *Ellis* v. *Penn Beef Co.*, 9 Del. Ch. 213; and *State ex rel. Weede* v. *Bechtel*, 239 Ia. 1298, 31 N.W. 2d 853 on the right to remedy a gift of corporate assets to a fiduciary.

The only substantial difference between the Class B and the Class A shares before reclassification was that the Class B shares controlled the corporation through their power to elect a majority of the board. When the 7500 class B shares were exchanged for 100,000 common shares, 92,500 shares were issued without any consideration passing to the corporation, unless adequate consideration existed in the 7500 Class B shares relinquishing their power of control. Those 7500 B shares, with an equity of only $125,353 and a yearly income of $11,250 could not by any normal procedures of evaluation or distribution of corporate property be the equivalent in value of 100,000 common shares in the book value of $1,388,049 and a market value (as of November 3, 1954) of $2,393,000. It is respectfully suggested that the only way that the 7500 B shares can equal the value of 100,000 shares is if the power of control inherent in the 7500 shares is misused to appropriate more than the fair share of corporate property to the owners of those shares.

It is respectfully submitted that some consideration of the applicable law on this transaction should have been given by the Court of Appeals.

It is respectfully submitted that the Court of Appeals also completely ignored the applicable principles of law and decided cases relating to the fiduciary duty of defendant Lichtenstein in connection with both the Employees' Stock Purchase Plan and the reclassification of the Class B shares. The cases *Pepper* v. *Litton*, 308 U.S. 295 at 306, 60 S.Ct. 238 at 245, 84 L. Ed. 281 at 289; *Lebold* v. *Inland Steel Co.*, 125 F. 2d 369 at 373 (C.C.A. 7th, 1941) cert. den. 316 U.S. 675; and *Zahn* v. *Transamerica Corp.*, 162 F. 2d 36 (C.C.A. 3rd, 1947) consider the duties of fiduciary officers, directors and controlling stockholders in somewhat comparable transactions.

In addition the fiduciary obligation of Levy in receiving for himself and his family $1,700,000 for Clas B stock having a book value of only $121,024 was completely ignored by the Court of Appeals.

The recent case of *Perlman* v. *Feldmann*, 219 F. 2d 173 (C.A. 2d 1955) cert. den. 349 U. S. 952, and the earlier cases of *Moulton* v. *Field*, 179 Fed. 673 (C.C.A. 7th) cert. den. 219 U. S. 586; *Insuranshares Corp.* v. *Northern Fiscal Corp.*, 35 F. Supp. 22 (D. C. Pa. 1940), and *Commonwealth Title Company* v. *Seltzer*, 227 Pa. 410 (76 Atl. 77) all recognize the basic rule that the officer and director who sells corporate control with the knowledge that the purchaser of that control will abuse it to unjustly enrich himself at the expense of the corporation is liable for excessive consideration received in that sale. It is respectfully suggested that some consideration should have been given by the Court of Appeals to the law applicable to this transaction.

In holding that the decision of the trial court must be affirmed on the basis of Rule 52a, the Federal Rules of Civil Procedure, 28 U.S.C., it is respectfully submitted that the Court of Appeals completely overlooked the fact that there was no dispute as to any basic evidentiary fact,

and that the only questions presented were questions of law as to whether the acts of the various defendants were fraudulent and in violation of their fiduciary duties. Substantially all the facts were developed by defendant's own documents or by testimony from the individual defendants. The evidence for the plaintiff was documentary in large part. Plaintiff personally had no knowledge of the facts involved and the accountant testifying for the plaintiff based all his computations upon the plaintiff's published statements which were in evidence. It is respectfully submitted that it is a gross misinterpretation of Rule 52a to apply it to the circumstances of the case at bar.

CONCLUSION.

While petitioner recognizes that there are cases which more urgently require the attention of the Supreme Court than this one, it is respectfully suggested that there are good reasons that the writ of certiorari should be granted.

The State of Delaware frequently is used as a state of incorporation for corporations operating throughout the United States. The practice of granting stock options or adopting stock purchase plans for the benefit of corporate executives has become widespread in our economy. The case at bar raises important questions as to the latitude which corporate fiduciaries have in voting such stock purchase plans for their own benefit.

The case also raises important questions as to the rights and obligations of a fiduciary in the sale of corporate control. Are not those officers and directors selling corporate control and those purchasing such control under duties as fiduciaries to the corporation and its stockholders: the seller to see that his price for the transfer

and the plans of the transferee are such that the corporation will not be despoiled, the purchaser not to use his newly acquired control to issue corporate stock to himself without adequate consideration passing to the corporation?

Finally, it is respectfully suggested that an even more important issue is presented by this case. Are not the courts, particularly the Courts of Appeal, under an obligation to pass upon a case properly presented to it by some consideration of the legal issues involved? Is this not a minimum requirement if confidence of litigants in our system of justice is to be maintained? If cases are to be decided without reference to the appropriate statutes, case law or principles of law involved, is not our system of justice bound to come into disrespect? It is most earnestly submitted that the decision involved herein in its complete neglect of the legal issues has so far departed from the accepted and usual course of judicial procedures as to constitute a gross miscarriage of justice and to call for exercise of the Supreme Court's power of supervision.

It is respectfully submitted that for the foregoing reasons this Court should grant this petition for certiorari.

Respectfully submitted,

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APPENDIX.

Opinion of the Court of Appeals.

Minnie KRANTMAN, Plaintiff-Appellant,

v.

LIBERTY LOAN CORPORATION et al., Defendants-Appellees.

No. 11903.

United States Court of Appeals
Seventh Circuit.

July 29, 1957.

FINNEGAN, Circuit Judge.

There is absent from this appeal any assertion that the findings of fact made by the district judge sitting without a jury are unsupported by the evidence. Under Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C., "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." After our study of this record and the parties' briefs we leave those findings undisturbed.

Minnie Krantman, plaintiff, owns 25 shares of Class A stock of the defendant, Liberty Loan Corporation, existing under Delaware laws, engaged in the small loan business. Plaintiff, an Iowa resident, acquired that stock September 16, 1954 at 23½ per share through her attorney who placed an order with a broker. Liberty issued its certificate on October 18, 1954 for those shares in plaintiff's name. Krantman's purchase took place approximately sixty days after defendant, I. H. Levy (President, Director and controlling stockholder of Liberty until July 19, 1954) together with several business associates and members of his family consummated a sale to Key Finance Company of their holdings of 7241 shares out of a total issue of 7500 Class

"B" shares of Liberty. In addition to the corporate defendant and Levy, other officers and directors of Liberty were joined as individual defendants.

This is a stockholder's derivative suit commenced October 20, 1954 on Liberty's behalf and its Class A stockholders complaining of, and challenging: (1) the Employees' Stock Purchase Plan; (2) the issuance of 92,500 shares of common stock allegedly without adequate consideration in the exchange of 7500 shares of Class B stock for 100,000 shares of common stock; (3) the receipt by I. H. Levy, Chairman of the Board, who was Liberty's president and controlling stockholder, of an allegedly excessive consideration in his sale of controlling shares to David B. Lichtenstein's group; and (4) the payment of a salary of $40,000 per year to Levy as part of the consideration for Levy's sale of Liberty shares. Plaintiff's original complaint was followed up with a Supplemental Complaint, filed November 17, 1954, and an Amendment to Complaint and Supplemental Complaint, filed November 17, 1954, and an Amendment to Complaint and Supplemental, filed September 12, 1955. Claims against I. H. Levy personally were first asserted in plaintiff's last pleading. After Krantman presented her evidence the trial judge correctly, we think granted defendants' motion to dismiss under Rule 41(b), Federal Rules of Civil Procedure, 28 U.S.C. In relevant part, that Rule governs this case: "After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff * * *. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)." A final decree was entered dismissing plaintiff's action for want of equity and this appeal followed.

Our recent discussion of Rule 41(b) in Penn-Texas Corporation v. Morse, 7 Cir., 1957, 242 F.2d 243 explains the impact of, and how, that Rule controls this appeal. The "Contested Issues" and "Propositions of Law Relied Upon" by Krantman in his brief are simply generalizations of law without bearing on the facts reported by the trial judge. The facts of this case are reported below as Krantman v. Liberty Loan Corporation, D.C. Ill. 1956, 152 F. Supp. 705.

All judgments, orders and decrees itemized in plaintiff's notice of appeal are hereby affirmed in all respects.

Judgment affirmed.

SWAIM, Circuit Judge.

I concur in the result.

PLAINTIFF'S EXHIBIT 23

LIBERTY LOAN CORPORATION

1. Based on June 30, 1954 audit included in proxy statement.

	Shares	Equity	Book Value per share
90¢ convertible preferred series	13,103	$ 209,648.00	$16.00*
1952 convertible preferred series	59,816	957,056.00	16.00*
Common — Class A	385,675	6,344,525.00	16.45
Common — Class B	7,500	123,378.00	16.45
Total Equity		$7,634,607.00	

2. Based on June 30, 1954 audit after conversion of preferred to Class A stock during 6 months ended December 31, 1954.

Actual conversion to Class A —	58,342 shares	
Actual redemption of preferred stock —	5,604.6 shares	
Total equity	$7,634,607.00	
Less redemption @ $16.00	89,673.60	
	$7,544,933.00	
Add employees' stock	93,600.00	
	$7,638,533.40	

	Shares	Equity	Book Value per share
Actual Class A remaining	444,017	$7,421,158.00	$16.71
Employees' stock purchase	93,600	92,023.00	.98
Class B	7,500	125,353.00	16.71
Total Equity		$7,638,534.00	

* Redemption value.

LIBERTY LOAN CORPORATION

3. Based on December 31, 1954 Baumann, Finney & Co. audit.

	Shares	Equity	Book Value per share
Common	444,017	$6,163,174.00	$13.88
Employees' Stock Plan	93,600	76,424.00	.816
Former Class B	100,000	1,388,049.00	185.07
Metropolitan	20,469	284,120.00	13.88
Metro	2,730	37,894.00	13.88
Total Equity		$7,949,661.00	

PLAINTIFF'S EXHIBIT 29

Record of money paid to dealers on 173,091 shares of Liberty Loan.

DEALER	Shs. in Individual's name	Money	Shs. in Firm name	Money	Total Paid
A. C. Allyn & Co.	995	$ 149.25		$	$ 149.25
Bache & Co.	50	7.50			7.50
M. H. Bishop & Co.	1,020	153.00			153.00
Blair & Co.	742	111.30			111.30
Boenning & Co.	2,807	421.05	698	104.70	525.75
Campbell, McCarty & Co.	9,310	1,396.50			1,396.50
Chase, Whiteside, Warren & Sears	255	38.25			38.25
Chilson, Newberry & Co.	2,212	331.80			331.80
Craigmyle & Co.	100	15.00			15.00
Cruttenden & Co.	1,585	237.75			237.75
Curtis, House & Co.	10	1.50			1.50
Dempsey-Tegeler Co.	5,239	785.85	975	146.25	932.10
Eastman, Dillon & Co.	100	15.00			15.00
A. G. Edwards & Sons	3,587	538.05			538.05
Estabrook & Co.	235	35.25			35.25
Fahnestock & Co.	200	30.00	25	3.75	33.75
Fairman, Harris & Co.	31,560	4,734.00			4,734.00
First Florida Investors	45	6.75			6.75
First Securities of Chicago	628	94.20			94.20
Folger, Nolan—W. B. Hibbs	200	30.00			30.00
French & Crawford	1,545	231.75			231.75
Fulton Reid	106	15.90			15.90
Fusz-Schmelzle	657	98.55			98.55
Glaser, Vogel	850	127.50			127.50
Hanrahan & Co.	410	61.50			61.50
Harris, Upham & Co.	300	45.00			45.00
Harvey, Klein & Co.	400	60.00			60.00
Barrett Herrick & Co.	195	29.25			29.25
Wayne Hummer & Co.	25	3.75			3.75
Johnston, Lemon & Co.	2,955	443.25	117	17.55	460.80
Edward D. Jones & Co.	19,247	2,887.05	1,046	156.90	3,043.95
Kerwin, Fotheringham & Co.	1,020	153.00	300	45.00	198.00
King & Co.	120	18.00			384.75
The Marshall Co.	2,565	384.75			384.75
J. P. Marto & Co.	450	67.50			67.50
McCourtney, Breckenridge	260	39.00			39.00
Metropolitan St. Louis Co.	6,498	974.70			974.70
Mid Continent Securities	1,575	236.25			236.25
Morfeld, Moss & Hartnett	2,895	434.25			434.25
Newhard, Cook & Co.	11,162	1,674.30	2,404	360.00	2,034.90
David A. Noyes & Co.	50	7.50			7.50
W. R. Olsen & Co.	50	7.50			7.50
Paine, Webber, Jackson & Curtis	150	22.50			22.50
Prescott, Wright, Snider Co.	749	112.35			112.35
Rambo, Close & Kerner	310	46.50			46.50
Ranson-Davidson & Co.	60	9.00			9.00
Reinholdt & Gardner	800	120.00			120.00
Irving J. Rice & Co.	300	45.00	412	61.80	106.80
Riter & Co.	14,437	2,165.55	2,110	316.50	2,482.05
Wm. C. Roney & Co.	150	22.50			22.50
Scherck, Richter Co.	8,014	1,202.10			1,202.10
Scott, Horner & Mason	170	25.50			25.50

DEALER	Shs. in Individual's name	Money	Shs. in Firm name	Money	Total Paid
Shaughnessy & Co.	100	15.00			15.00
Shillinglaw, Bolger & Co.	100	15.00			15.00
K. M. Simon & Co.	85	12.75			12.75
Stifel, Nicholaus & Co.	4,365	654.75			654.75
Stirling, Morris & Bousman	2,280	342.00			342.00
Stix & Co.	386	57.90			57.90
Strader, Taylor & Co.	17	2.55			2.55
Straus, Blosser & McDowell	1,840	276.00			276.00
Sutro Bros.	275	41.25			41.25
Wm. H. Tegtmeyer & Co.	40	6.00			6.00
Thayer, Baker & Co.	100	15.00			15.00
Albert Theis & Sons	1,153	172.95			172.95
Lewis D. Thill	1,585	237.75			237.75
Union Security Co.	250	37.50			37.50
G. H. Walker & Co.	5,834	875.10	1,144	171.60	1,046.70
O. H. Wibbing	2,650	397.50			397.50
C. T. Williams & Co.	3,025	453.75			453.75
H. P. Wood & Co.	100	15.00			15.00
Woodward-Elwood & Co.	20	3.00			3.00
F. S. Yantis	300	45.00			45.00
TOTALS	163,860	$24,579.00	9,231	$1,384.65	$25,963.65

Liberty Loan Corporation-Dealer Solicitation Account

Check from Lib. Loan dtd. 11/24/54			$44,839.10
Check from Lib. Loan dtd. 12/3/54			1,979.40
Check from Lib. Loan dtd. 12/9/54			2,458.20
Pd. by R & Co. on 173,091 Shs.		$25,963.65	
Service Fee for Sol. Managers		22,500.00	
East Wisconsin — No Agreement	$1.50		
Merrill Lynch — No Agreement	30.00		
Walston & Co. — No Agreement	18.00		
Webber-Simpson — No Agreement	7.50		
Chauncey Shull — Not a dealer	4.50		
Newberry & Co. — Not a dealer	9.00		
Orstim — Not a dealer	7.50		
Boettcher — Not Blue Skyed State	58.50		
Chas. Cheney — Not NASD	7.50		
J. C. Kahn — Not NASD	15.00		
Geo. Wallace — Not NASD	7.50		
Excess payment by Lib. Loan	646.55		
Check to Lib. fr. R: & Co. dtd 2/28/55		813.05	
		$49,276.70	$49,276.70

STATUTE INVOLVED.

The full text of Volume 4, *Delaware Code Annotated*, Title 8, Section 262; Section 262 Delaware Corporation Law is as follows:

§262. Payment for stock or membership of person objecting to consolidation or merger

(a) When used in this section, the word "stockholder" means and includes a holder of stock in a stock corporation and also a member of a non-stock corporation; the words "stock" and "share" mean and include what is ordinarily meant by those words and also the membership or membership interest of a member of a non-stock corporation.

(b) The corporation resulting from or surviving any consolidation or merger shall within 10 days after the date on which the agreement of consolidation or merger has been filed and recorded, notify each stockholder in any corporation of this State consolidating or merging, who objected thereto in writing and whose shares were not voted in favor of such consolidation or merger, and who filed such written objection with the corporation before the taking of the vote on such consolidation or merger, that the agreement has been filed and recorded. The notice shall be sent by registered mail, return receipt requested, addressed to the stockholder at his last known address as it appears on the books of the corporation. If any such stockholder shall within 20 days after the date of mailing of the notice demand in writing, from the corporation resulting from or surviving such consolidation or merger, payment for his stock, such resulting or surviving corporation shall, within 30 days after the expiration of the period of 20 days, pay to him the value of his stock on the date of the recording of the agreement of consolidation or merger, exclusive of any element of value arising from the expectation or accomplishment of such consolidation or merger.

(c) If during the period of 30 days provided for in subsection (b) of this section, the corporation and any

such objecting stockholder fail to agree as to the value of such stock, any such stockholder, or the corporation resulting from or surviving such consolidation or merger, may by petition filed in the Court of Chancery within four months after the expiration of the period of 30 days demand a determination of the value of the stock of all such objecting stockholders by an appraiser to be appointed by the Court.

(d) Upon the filing of any such petition by a stockholder, service of a copy thereof shall be made upon the corporation, which shall within ten days after such service file in the office of the Register in Chancery in which the petition was filed a duly verified list containing the names and addresses of all stockholders who have demanded payment for their shares and with whom agreements as to the value of their shares have not been reached by the corporation. If the petition shall be filed by the corporation, the petition shall be accompanied by such a duly verified list. The Register in Chancery shall give notice of the time and place fixed for the hearing of such petition by registered mail to the corporation and to the stockholders shown upon the list at the addresses therein stated, and notice shall also be given by publishing a notice at least once a week for two successive weeks, the second publication to appear at least one week before the day of the hearing, in a newspaper of general circulation published in the City of Wilmington, Delaware. The Court may direct such additional publications of notice as it deems advisable. The forms of the notices by mail and by publication shall be approved by the Court.

(e) After the hearing of such petition the Court shall determine the stockholders who have complied with the provisions of this section and become entitled to the valuation of and payment for their shares, and shall appoint an appraiser to determine such value. Such appraiser may examine any of the books and records of the corporation or corporations the stock of which he is charged with the duty of valuing, and he shall make a determination of the

value of the shares upon such investigation as to him seems proper. The appraiser shall also afford a reasonable opportunity to the parties interested to submit to him pertinent evidence on the value of the shares. The appraiser, also, shall have such powers and authority as may be conferred upon masters by the rules of the Court of Chancery or by the order of his appointment.

(f) The appraiser shall determine the value of the stock of the stockholders adjudged by the Court of Chancery to be entitled to payment therefor and shall file his report respecting such value in the office of the Register in Chancery and notice of the filing of such report shall be given by the Register in Chancery to the parties in interest. Such report shall be subject to exceptions to be heard before the Court both upon the law and facts. The Court shall by its decree determine the value of the stock of the stockholders entitled to payment therefor and shall direct the payment of such value, together with interest, if any, as hereinafter provided, to the stockholders entitled thereto by the resulting or surviving corporation upon the transfer to it of the certificates representing such stock, which decree may be enforced as other decrees in th Court of Chancery may be enforced, whether such resulting or surviving corporation be a corporation of this State or of any other state.

(g) At the time of appointing the appraiser or at any time thereafter the Court may require the dissenting stockholders to submit their certificates of stock to the Register in Chancery for notation thereon of the pendency of the appraisal proceedings, and if any stockholder fails to comply with such direction the Court may dismiss the proceedings as to such stockholder.

(h) The cost of any such appraisal, including a reasonable fee to and the reasonable expenses of the appraiser, but exclusive of fees of counsel or of experts retained by any party, may on application of any party in interest be determined by the Court and taxed upon the parties to

such appraisal or any of them as appears to be equitable, except that the cost of giving the notice by publication and by registered mail hereinabove provided for shall be paid by the corporation. The Court may, on application of any party in interest, determine the amount of interest, if any, to be paid upon the value of the stock of the stockholders entitled thereto.

(i) Any stockholder who has demanded payment of his stock as herein provided shall not thereafter be entitled to vote such stock for any purpose or be entitled to the payment of dividends or other distribution on the stock (except dividends or other distributions payable to stockholders of record at a date which is prior to the date of the recording of the agreement) unless the appointment of an appraiser shall not be applied for within the time herein provided, or the proceeding be dismissed as to such stockholder, or unless such stockholder shall with the written approval of the corporation deliver to the corporation a written withdrawal of his objections to and an acceptance of such consolidation or merger, in any of which cases the right of such stockholder to payment of his stock shall cease.

(j) The shares of the surviving or resulting corporation into which the shares of such dissenting stockholders would have been converted had they assented to the consolidation or merger shall have the status of authorized and unissued shares of the surviving or resulting corporation.